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(19,845.)

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1906.

No. 79.

THE TEXAS & PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

vs.

THE CISCO OIL MILL,

Defendant in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS.

Brief for Defendant in Error.

J. J. BUTTS,

Counsel for Defendant in Error.

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Brief for Defendant in Error.

Abstract of the Case.

Counsel for defendant in error has not a copy of the brief for plaintiff in error before him; he assumes, however, that the statement of the case made in the brief is full and fair; nevertheless, he submits the following as a brief abstract of the case.

Defendant in error brought this action against plaintiff in error in the district court of Eastland county, Texas, for the recovery of the sum of $641.69, alleged over-charge on four car

loads of cotton seed shipped from Moreauville and Cottonport, in the State of Louisiana, to Cisco, in the State of Texas, alleging, among other things, that the freight charged and collected of and from defendant was unreasonable and excessive. (Printed Record, pp. 2–4). To the cause of action set out in the petition of defendant in error, plaintiff in error interposed in the trial court, INTER ALIA, (1) a plea to the jurisdiction of the court, alleging the shipments complained of were inter-state; that the damages, if any, were a consequence of a violation of the inter-state commerce law, and that the Federal Court alone had jurisdiction to hear and determine the controversy; (2) a special exception to the allegations made and contained in the petition of defendant in error, urging want of jurisdiction in the state court. (Printed Record pp. 14–15.); a special exception, excepting to so much of the petition of defendant in error as prayed for attorney's fee. (Printed Record p. 17.) (3), a general denial, and (4) a special answer setting up the fact that the shipments complained of were interstate; that plaintiff in error had, prior to the said shipments, promulgated, published and posted schedules of freight rates, showing the rate on cotton seed between the points of shipment and destination to be 67 cents per 100 pounds; that this schedule had been duly filed with the Interstate Commerce Commission and that it would have been unlawful for it to have charged a less freight rate than that shown by the printed, published and posted schedule. (Printed Record, pp. 18–19.)

The trial court overruled the plea to the jurisdiction of the court, and all exceptions of defendant in error, except the one numbered 6½ urged to so much of the petition of defendant in error as prayed for attorney's fees. (Judgment of the trial court, printed record, pp. 20–21.)

The cause was tried before the court without the intervention of a jury, and resulted in a judgment in favor of plaintiff in error. (Printed record, p. 21.)

The trial court filed conclusions of law and of fact. (Printed record pp. 28–31.)

Defendant in error prosecuted an appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and the judgment of the trial court was reversed and judgment rendered in favor of defendant in error. (Printed record, p. 59.) Plaintiff in error filed a motion for rehearing (Printed record pp. 60–63), which was, by the Court of Civil Appeals, overruled;

(Printed record p. 63;) plaintiff in error filed a petition for writ of error, (Printed record, pp. 63–67), which was granted [Printed record p. 67;] filed assignment of error, [Printed record pp. 70–73] and brings the cause to this Court for review.

The plaintiff in error, by its assignments of error to the proceedings, decision and judgment of the Court of Civil Appeals, presents two questions to this Court for consideration: 1. It challenges the jurisdiction of the state court to hear and determine the controversy; and 2. Complains of the conclusion of fact by district court, finding and holding that the freight rate charged defendant in error was unreasonable and excessive, which conclusion of fact was adopted by the Court of Civil Appeals.

Taking these propositions in their inverse order, we deem it sufficient answer to the contention of plaintiff in error calling in question the correctness of the conclusion of fact complained of, to direct this Court's attention to the fact that the "conclusion" complained of was a finding of fact by the district court, which was adopted by the Court of Civil Appeals; and, on error to the latter court, this finding of fact is conclusive on this Court. Such has been the ruling of this Court from the beginning, and is no longer an open question.

Chrisman vs. Miller, 197 U. S., 312, 319.

Jenkins vs. Neff, 186 U. S., 230, 234 235.

Hendricks vs. A. T. & S. F. R. R. Co., 167 U. S., 673, 677.

Republican River Bridge Co. vs. Kansas P. R. Co., 92 U. S., 315.

Egan vs. Hart, 165 U. S., 189.

But were the ruling of this court on the proposition to the contrary, plaintiff in error is precluded from urging this question in his forum, because of its failure to urge it in the Court of Civil Appeals. [Opinion Court of Civil Appeals. Printed, Record p. 58.]

JURISDICTION OF STATE COURTS.

Plaintiff in error challenged the jurisdiction of the district court by a plea to the jurisdiction of that court; and special exceptions 3 and 4. Following are copies of its plea to the jurisdiction of the district court, and of its special exceptions presenting this question:

PLEA TO JURISDICTION.

"Now comes the defendant, The Texas & Pacific Railway Company, and for answer in this behalf says:

[1] It plainly appears from plaintiff's first amended original petition, filed herein on day of 1904, that shipments in controversy are interstate shipments; that said shipments originated in the state of Louisiana at the towns Moreauville and Cottonport; that the destination of the cotton seed involved in each shipment in controversy was Cisco, Texas; that it plainly appears from plaintiff's said first amended original petition that said shipments were subject to, and were made under, the provisions and regulations of the interstate commission act only; and that said shipments were and are subject to the act of Congress and that the terms and provisions of the Federal Statute relating to and regulating the transportation of commerce from one state into another, and across and through another state, other than the origination of said shipments, and the controversy in this case arises under the law of the United States relating to a subject matter over which Congress has exclusive control; that, by the terms of said Federal Statute a party who seeks damages alleged to have been sustained in consequence of a violation by a common carrier of the interstate commerce law AS REGULATED exclusively to the Commission or the Federal Court; in other words, a party who seeks damages alleged to have been sustained in consequence of a violation of said interstate commerce law, because of the commission of any act on the part of a common carrier, must bring his cause of action, if any he has, in some Federal Court of competent jurisdiction, or by proper complaint filed with and properly prosecuted before said Interstate Commerce Commission. This defendant further says and alleges that this court is without jurisdiction to hear and determine the rights of the plaintiff and the cause of action alleged and sought to be maintained against this defendant by the plaintiff in this cause," etc., etc. [Printed Record pp. 14 15].

SPECIAL EXCEPTION No. 3.

"For special exception herein defendant says plaintiff's first amended original petition herein filed is insufficient in law for plaintiff to have and maintain this or any other cause of action upon the allegations therein contained, because it plainly appears from the face and the allegations contained in said first amended original petition that plaintiff, if any cause of action

he has against this defendant, can only prosecute and maintain the same in some Federal Court of competent jurisdiction, or by proper complaint filed with, and properly prosecuted before, the Interstate Commerce Commission of the United States of America, etc., etc."

SPECIAL EXCEPTION No. 4.

"For futher special exception to plaintiff's first amended original petition filed herein this defendant says said petition is insufficent in law, [1] because it plainly appears from the face and allegations of said petition that plaintiff, if any cause of action it has, is seeking to recover damages from this defendant because of the charge and collection of a freight and tariff rate charged and collected by this defendant from plaintiff in contravention of the provisions of the interstate commerce law; [2] because it does not appear from the allegations contained in plaintiff's said first amended original petition that this defendant demanded or collected any sum or sums of money, or any rate or rates, not provided and contained in its schedule or rate filed before the Interstate Commerce Commission of the United States of America; [3] because it does not appear from the said petition and the allegations therein contained that this defendant demanded or collected from plaintiff as compensation for the transportation of the cotton seed mentioned in plaintiff's petition, any sum or sums of money in excess of the amount it was entitled and compelled to collect and demand from plaintiff for the transportation of said cotton seed from the point of origination to the point of destination, as provided by its schedule of rate on file with the Interstate Commerce Commission of the United States of America, and in force and effect at the time of said shipments, etc." [Printed Record pp. 15-16]

From a casual reading of the plea to the jurisdiction of the state court interposed by the plaintiff in error in the district court, and its special exceptions challenging the jurisdiction of that court, quoted above, it is manifest that the plaintiff in error labored, and is still laboring under the impression that defendant in error bases its cause of action upon the violation of some provision of the Interstate Commerce Act by the plaintiff in error, or, that the allegations in the first amended original petition of defendant in error show a compliance with the terms and provisions of the Interstate Commerce Act by the plaintiff in error prior to the time of the shipments in controversy. The

Court of Civil Appeals fell into a similar error. (See its opinion, Printed Record pp. 57–58.)

But the fact is, that defendant in error bases its right of action on the common law governing and controlling common carriers in respect to their charges for transportation of freight, and is pursuing a common law remedy. It neither alleges a violation of any provision of the Interstate Commerce Act; nor that plaintiff in error had complied with the provisions thereof prior to the time of the shipments in controversy; nor seeks recovery on account of a violation of any of its terms or provisions by plaintiff in error: That this may more clearly appear, we quote the first count in the first amended original petition of defendant in error, to which the above plea and exceptions were addressed:

"That, at several times hereinafter mentioned and referred to, defendant was, and still is, a common carrier of freight, engaged in the business of carrying and transporting freight for the public for compensation, to and from the aforesaid towns and stations on its said line of railway: and that, as such common carrier, it became, and was, the duty of the defendant to receive, transport and carry freight and products of the kind and character hereinafter mentioned and referred to, when tendered to it at one of its stations, for a fair, just and reasonable compensation; and that it then had, and now has, no legal right to charge demand or receive an unjust, exhorbitant and unreasonable price for carrying and transporting freight.

That, at said several times hereinafter mentioned and referred to, the sum of thirty [30] cents per 100 pounds was a fair, just and reasonable price, charge and compensation for carrying and transporting cotton seed, in car load lots, in bulk, from the aforesaid towns of Moreauville and Cottonport, in the State of Louisiana, to the said city of Cisco, in the State of Texas.

That on to wit: the 20th, 26th and 28th, days of September, 1901, plaintiff had at the said town of Moreauville, in the State of Louisiana, cotton seed in bulk, which it desired to have shipped and transported to the city of Cisco; and that, on each of said dates, the Planters Gin Company, acting for and on behalf of plaintiff, tendered to the defendant, at said town of Moreauville, a car of cotton seed, in bulk, to be shipped, carried and transported to the said city of Cisco, and there to be deliverd to plaintiff, which said three cars of cotton seed the

defendant then and there received and accepted, and executed its three certain bills of lading therefor acknowledging the receipt thereof from the said Planters Gin Compa and promising, agreeing and undertaking to transport and he same to the said city of Cisco, and to there deliver the plaintiff. And that, on to-wit: the 25th day of Sep 1901, plaintiff had a car of cotton seed at the afore own of Cottonport, in the State of Loisiana, which it desired to have shipped, transported and carried to the said city of Cisco, and there to be delivered to plaintiff, which said car of cotton seed was, on the said 25th, day of September, 1901, tendered to the defendant at said town of Cottonport by one Lemoine, who was then and there acting for and on behalf of plaintiff, which defendant then and there received and accepted, and executed and delivered its bill of lading therefor, acknowledging the receipt thereof from the said Lemoine, and promising, agreeing and undertaking to carry and transport the same to said city of Cisco, and there deliver the same to plaintiff; that in said several bills of lading so executed by the defendant, no freight rate on said cotton seed therein specified was named or mentioned; that, by reason of the premises, defendant promised and agreed and undertook to carry and transport said cotton seed from the said towns of Moreauville and Cottonport to the said city of Cisco for a fair, just and reasonable compensation, which plaintiff avers would have been, and was, thirty (30) cents per 100 pounds; that said four cars of cotton seed weighed, respectively, to-wit: 40,530 pounds, 48,200 pounds, 40,090 pounds and 44,610 pounds, aggregating 173,430 pounds.

That, notwithstanding it was the duty of defendant to transport and carry said four cars of cotton seed from said towns of Moreauville and Cottonport to said city of Cisco, for a fair, just and reasonable compensation and charge, and that thirty (30) cents per 100 pounds would have been, and was, a fair, just and reasonable price, charge and compensation for so carrying and transporting the same, when the said four cars of cotton seed arrived at said city of Cisco, defendant demanded of plaintiff the sum of sixty-seven (67) cents per 100 pounds for freight charges thereon; and that plaintiff, in order to get possession of its said four cars of cotton seed, was compelled to pay, and did pay, the sum of sixty-seven (67) cents per hundred pounds thereon; that the amount of unjust, unreasonable, excessive and

unfair freight charges so demanded and collected of and from plaintiff on said four cars of cotton seed aggregated to the amount of, to wit: $641.69, in this: that the total freight charges on said four cars of cotton seed at thirty (30) cents per hundred pounds, which plaintiff avers would have been, and was, a just and reasonable compensation for carrying and transporting the same, and that, at this rate, the total freight charged would have amounted to, to-wit: $520.29, while the defendant demanded, charged and compelled plaintiff to pay to it, freight on said four cars of cotton seed at the rate of sixty-seven (67) cents per 100 pounds, which amounted, in the aggregate, to the sum of, to-wit: $1161.98, which last mentioned sum and amount defendant demanded of and from plaintiff, and required and compelled plaintiff to pay the same before defendant would deliver to plaintiff its said four cars of cotton seed; and that plaintiff was required to pay to defendant said sum of, to wit: $1161.98, before it could get possession of its said cotton seed, the same being paid by plaintiff under protest.

That said of excessive freight so paid to defendant by plaintiff on said four cars of cotton seed was so paid to, and received by, defendant as follows, to-wit: $149 96 on September 28th, $178.34 on September 30th, $148.33 on October 2nd, 1901, and $165.06 on Oct. 3d, 1901." (Printed Record, pp. 2, 3, 4.)

The cause of action is, in some respects, stated differently in other counts, or parts, of the petition; but this is permissable under the system of pleading and practice of Texas. (See Opinion of Court of Civil Appeals in this cause, Printed Record 1. 58) Fowler vs. Stoneum 11 Texas, 511; Taylor Cotton Seed Oil Co. vs. Pumphrey, 32 S. W. Rep., 225.

No where in the petition is the Interstate Commerce Act, or Law, mentioned or referred to.

If any count, or part, of the petition showed a cause of action of which the district court of Texas had jurisdiction, that court did not err in overruling the plea to the jurisdiction and the special exceptions calling into question the jurisdiction of that court, because they were, each and all, addressed to the entire petition. Special exceptions addressed to portions of the petition, possibly, might have been sustained by the trial court and by the Court of Civil Appeals; but as plaintiff in error did not resort to this method of attacking the pleading, it is useless to speculate as to what the result might have been, had this been done; but in any event sufficient allegations would have re-

mained to state a cause of action within the jurisdiction of the state court. It will be observed that the special exception of plaintiff in error attacking that portion of the petition which sought recovery of attorney's fees was sustained by the trial court. (Printed Record p. 21.)

On the question of the jurisdiction of the State courts to hear and determine the controversy involved in this cause, we submit:

1. While it is true that the legislative control of commerce between the states is vested in Congress, it does not thereby follow that state courts may not hear and determine controversies between their citizens, and between their citizens and citizens of other states, growing out of such business and involving Federal laws enacted in pursuance of the constitution by Congress governing the same. Western U. Tel. Co. vs. Call Pub. Co., 181 U. S., 92, 100, 101, 102, 103. Plaquemines Tropical Fruit Co. vs. Henderson, 170 U. S. 513, 515, 516.

It is evident that Congress did not, in the enactment of the Interstate Commerce Act, intend to oust the state courts of jurisdiction of such controversies as are here involved; on the other hand, it would seem that the rights of the citizen in respect to his remedies existing at the time of the enactment of that law, were jealously guarded and secured by the Act itself, as will appear from the following quotation from section 22 thereof. " * * * and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." U. S. Compiled Statutes, – p. 3171.

The fact that, by the terms of the Interstate Commerce Law, a right of action is given in the Federal Courts does not raise the presumption that the jurisdiction of the state courts over the subjects therein referred to are excluded. Plaquemines Tropical Fruit Co. vs. Henderson, 170 U. S. 513–515.

2. As neither the facts given in evidence on the trial of the cause in the district court, nor the findings of facts by that court, show that plaintiff in error had complied with the terms and provisions of the Interstate Commerce Law, which required common carriers engaged in the transportation of interstate commerce, to plainly print their schedules of interstate freight rates in large type, containing the classification in force, and stating the names of the places upon its railroad between which property will be carried, and to post two copies thereof in conspicuous places in every depot, station or office of such carrier

where freight is received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected.

There is no evidence in the record showing, or tending to show, that a copy of the schedule offered in evidence on the trial of the cause had ever been posted in any depot; nor did the trial court find as a fact that a copy of it had been posted in any depot, station or office upon the railroad of plaintiff in error where freight is received for transportation. The trial court did find, as a fact, that a copy of the schedule was on file in the depot of plaintiff in error at Cisco, at the time of these shipments. But in paragraph 6 of its findings of fact, (Printed Record p. 30) the court says: "No evidence, however, was offered as to whether or not said books of freight rates and classification were or were not actually on file at Cottonport and Moreauville and the court makes no finding as to that fact." The evidence further showed, and the court found as a fact, "that there was in the the office and possession of defendant's agent at Cisco, a book of tariff rates showing the freight rates to Cisco from the aforesaid points and all other points on said road in La. and showing that the freight tariff from Cottonport and Moreauville to Cisco on freight known as "Class A" was 67 cents per hundred pounds, in car lots, of not less than forty thousand pounds. Said book referred to a book of classifications of freights compiled by the Western Classification Association for information as to how freight was classed, and said book so compiled by the Western Classification Association was also on file in the office of defendant's agent at Cisco, the said book of classification showed cotton seed was listed as "Class A." (Printed Record pp. 29–30.)

G. S. Maxwell, chief clerk in the freight department of defendant in error, testified on the trial of the cause in the district that "an ordinary business man, without any outside information, could not take this tariff sheet (the one introduced in evidence and upon which plaintiff in error relies) without referring to something else, and tell what the rate on cotton seed would be from any point." (Printed Record p. 51.)

Geo. Langston, agent of defendant at Cisco, testified that "an ordinary business man, not familiar with railroad terms and classifications, could not, by inspection of this tariff sheet (the one introduced in evidence and relied upon by plaintiff in error), without reference to any thing else, tell what the freight

rate on cotton seed would be from any point; it would be necessary to refer to the Western Classification to see how it was classed." (Printed Record p. 52.)

Defendant in error contended in the State courts, and still contends, that these facts testified to by the witnesses for the plaintiff in error, and found by the trial court, do not show such a compliance with the provisions of the Interstate Commerce Act as to have made its freight rates on cotton seed effective under that law, and that the case was, and is, governed by the common law of England, which was adopted by Texas in 1840, and was in force in the State at the time of the several shipments complained of. Revised Civil Statutes of Texas, of 1905, Article 3258.

There was no evidence that the schedules of freight rates were plainly printed; the facts showed that they did not contain the classification of freight, reference to an independent publication being necessary to show such classification; that they were so printed and published that an ordinary business man could not determine the freight rate on cotton seed between any two points on the railway line of plaintiff in error, without seeking information ALIUNDE the printed schedules; and there was no evidence whatever showing, or tending to show that the schedules of freight rates so printed by plaintiff in error had ever been posted at, or in, any depot, office or station of plaintiff in error, or any where else. It is true, Mr. Maxwell, the witness for plaintiff in error above referred to, testified that copies of the schedule had been sent to all local agents of the plaintiff in error; (Printed Record p. 51) but the law required them to be posted in two "public and conspicuous places in every depot, * * * * station or office * * * * where freight and passengers, respectively, are received for transportation." Interstate Commerce Act, Section 6, U. S. Compiled Statutes 1, 3156. The evidence and the facts found by the trial court, quoted above, affirmatively show that these requirements had not been met by the plaintiff in error prior to the time of the shipments complained. "Shippers are not affected by the Act until the required publication of rates has been made, and, to bring them within its operation in a given case, the burden is upon the carriers to show compliance with the condition precedent. If the contest be with reference to a shipment over a single line, the carrier, to have the benefit of the act, against its patron, must show publication at each of its stations." Atlanta,

K. & N. Ry. Co. vs. Horne, 106 Tenn., 73. Here we have a "contest in reference to a shipment over a single line," with no publication whatever of its schedule of freight rates between the points of shipment; and no evidence showing, or tending to show, that the schedules had ever been posted at any station, depot or office of plaintiff in error; or that a copy thereof was in possession of any of its agents, except the local agent at Cisco.

When it is remembered that the agent of plaintiff in error at Cisco, who had been its station agent at that point for about fifteen years, could not, from an inspection of the printed schedule relied upon by plaintiff in error, determine the frieght rate on cotton seed, in car load lots, between Moreauville and Cottonport, in the State of Louisiana, and Cisco, Texas, (Testimony of the witness Langston, Record p. 52, Paragraph 5, Trial Court's Conclusion of Facts, Record p. 30) and that no publication whatever of the schedule was attempted to be shown, it occurs to us that it would be hard, indeed, to hold defendant in error bound by the schedule, or that the facts were sufficient to oust the state court of jurisdiction of the case.

2. Except in cases where jurisdiction over the subject matter of litigation is conferred exclusively on the Federal courts, as a matter of pleading, the presumption is in favor of the jurisdiction of the state court and against that of the Federal court. Where there is nothing on the face of the pleadings of the plaintiff, or complainant, as in this case, to show that the cause is one which falls exclusively within the jurisdiction of the Federal courts, it is the duty of the defendant to show, by proper allegations in its answer, that the state court has no jurisdiction; and, it being necessary to allege such facts, it follows as corollary, that the facts alleged must be proven by competent evidence.

The first count, or statement of the cause of action of defendant in error, set out in first amended original petition, stating an action cognizable by the district court of Texas, it was the duty of plaintiff in error, if it wished to challenge the jurisdiction of that court, to allege and prove such facts as would show that the Federal Court, alone, had jurisdiction of the subject matter involved. In its special answer filed in the district court, plaintiff in error alleged, among other things, "that said schedule of rates were promulgated, published and posted by it (plaintiff in error) in accordance with the provisions of the Interstate Commerce Law;" it is further alleged, in sub-

stance, that the freight rate on cotton seed between the points of shipment and the destination, was sixty-seven *(67)* cents per 100 pounds; that the freight rate on cotton seed between the initial and terminal points having been thus established, plaintiff in error "was not authorized, and could not, in accordance with law, legally have demanded or collected from plaintiff a lesser or greater rate for the transportation of cotton seed from Moreauville and Cottonport, in Louisiana, to Cisco, Texas, than 67 cents, as was provided in the schedule of rates promulgated, PUBLISHED and POSTED by this defendant in accordance with the terms and provisions of the Interstate Commerce Law of the United States of America, as aforesaid." (Printed Record pp. 17-18.) Having alleged these facts as a bar to recovery by defendant in error, it became, and was, the duty of plaintiff in error to prove them.

Of course, we understand that the question of jurisdiction, in so far as the subject matter of the action is concerned, is one which may be taken advantage of at any stage of the proceedings, or of which the court will of its own motion, take cognizance; but a mere allegation of facts showing want of jurisdiction, standing alone, and without any proof to support the allegation, is not sufficient to defeat the jurisdiction of a court which has assumed to determine a controversy between litigants.

In this cause the plaintiff in error, for the purpose of defeating the jurisdiction of the state courts, relies wholly upon the enactment of the Interstate Commerce Act by the Federal Congress. The facts adduced in evidence on the trial of the cause, and the findings of fact by the district court, which are binding on this Court, do not show that plaintiff in error had complied with the provisions and requirements of the Interstate Commerce Act prior to the time of the shipments in controversy; the district court found as a fact, that "no evidence, however, was offerred as to whether or not said book of freight rates and classifications were or were not actually on file at Cottonport and Moreauville, and the court makes no finding as to that fact." (Printed Record, p. 30.) An examination of the fact given in evidence will show that no evidence was offered to prove that such schedules of freight rate had been posted at any depot, station or office of plaintiff in error prior to the shipments in controversy. As paintiff in error had alleged a full and complete compliance with the requirements of the Interstate Commerce Law in respect to the prinit-

ing, publishing and posting of its freight rates, it evidently considered proof thereof as being essential to defeat defendant in error; the fact that it had, or had not, complied with the law, was peculiarly within its own knowledge, and the failure to prove compliance must be taken as conclusive of the fact that it had failed to do so. Plaintiff in error certainly will not be permitted to take advantage of a Federal statute which it has ignored, or with the requirements of which it has failed to comply.

Plaintiff in error having failed to print, publish and post its purported interstate freight rates in accordance with the requirements of the Interstate Commerce Act, the shipments under consideration, and the freight rates thereon, are governed and controlled by the common law, which prohibits unjust and unreasonable freight charges by a common carrier, and the state courts had jurisdiction to hear and determine the controversy.

Defendant in error respectfully submits that the judgment of Court of Civil Appeals for the Second Supreme Judicial District of Texas ought to be affimed by this Court.

J. J. BUTTS,

Counsel for Defendant in Error.